Supreme Court, U.S.
FILED
SEP 4 2003
OFFICE OF THE CLERK

No. 03-106

In The

Supreme Court of the United States

The Federal Democratic Republic of Ethiopia
and The Commercial Bank of Ethiopia,
Petitioners,

v.

Hiwot Nemariam; Belay Redda; Sertzu Gebremeskel; Mebrahtu Gebremedhin; Fekadu Andemeskal; and Mebrat Gebreamlak, widow and personal representative of the estate of Tedros Asfaha,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM

W. DEVIER PIERSON
Counsel of Record
KNOX BEMIS
ERICA L. SALMON
PIPER RUDNICK LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 371-6000

Attorneys for Petitioners

19pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY MEMORANDUM 1
CONCLUSION 9

TABLE OF AUTHORITIES

Cases: **Pages**

Abrahim-Youri v. United States, 139 F.3d 1462 (Fed. Cir. 1997) 1,7

Aguinda v. Texaco, Inc. 303 F.3d 470 (2d Cir. 2002) 3

Dames & Moore v. Regan, 453 U.S. 654 (1981) 7

Gonzalez v. Chrysler Corp., 301 F.3d 377 (5th Cir. 2002), *cert denied*, 123 S. Ct. 1928 (2003) 4

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 2

Iragorri v. International Elevator, Inc., 203 F.3d 8 (1st Cir. 2000) 3

In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195 (2d Cir. 1987) 4

In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 634 F.Supp. 842 (S.D.N.Y. 1986) 4

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) ..... *passim*

Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390 (2d Cir. 1985) 8

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983). 8

Statutes:

28 U.S.C. §§ 1602-1611 8

Other Authorities:

Restatement (Third) of the Foreign Relations Law of the United States (1987) 3,5

REPLY MEMORANDUM

Respondents' Brief in Opposition ("Opp.") does not refute the compelling reasons that support a grant of certiorari in this case. Contrary to Respondents' assertion (Opp. 16), the decision below does impose *per se* disqualification of arbitral tribunals in which individual claims are espoused by the claimant's state, and it violates the principles set forth by this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The D.C. Circuit's ruling cannot be reconciled with *Piper* or with other court of appeals decisions on the adequacy of foreign forums.

Moreover, Respondents fail to refute Petitioners' showing that the ruling of the court below is in conflict with the decisions of this Court and other courts of appeal that have accepted the use of the espousal procedure as applied to U.S. nationals, *e.g., Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997). If permitted to stand, the decision will not only constrict the availability of the doctrine of *forum non* conveniens to protect the U.S. courts against lawsuits that should be handled in other forums, but will also threaten the use of the espousal procedure in state-to-state tribunals and in other contexts where it is commonly used, such as the settlement of private claims against foreign sovereigns.

1. Respondents' contention that the court of appeals decision was a "Routine Application of *Piper*" (Opp. 7 (Section I.A.)) is difficult to take seriously. The D.C. Circuit took the unprecedented step of excluding from the application of the *forum non conveniens* doctrine an entire category of potential alternative forums, i.e., international arbitral tribunals in which claims are espoused by the state on behalf of individual claimants. This blanket disqualification cannot be reconciled with the standard set

forth by this Court in *Piper* and applied by numerous courts implementing the *Piper* doctrine.[1]

Petitioners do not, as Respondents suggest (Opp. 7-8), "merely quibble with the application of a legal standard that they concede was both relevant and correctly stated." Flexibility and a consideration of the facts of each case are at the heart of the *forum non conveniens* doctrine set forth in *Piper*.[2] Petition for Writ of Certiorari ("Pet.") 9-10, 16-17. In making the inquiry pursuant to *Piper's* admonition that any alternate forum will be inadequate only in "rare circumstances" (454 U.S. at 255, n. 22), the court of appeals made no effort to determine if the facts before it gave rise to those rare circumstances that would short-circuit a determination of which forum was preferable under the public and private factors set forth in *Gilbert*. Instead, the D.C. Circuit took the position that, because the claims had been espoused and were now controlled by the state, the

---

[1] Respondents' argument (Opp. 8-9) that the court of appeals correctly made the two-step analysis mandated by *Piper* is a straw-man argument inasmuch as it is the manner – not the sequence – in which the inquiry was made that clashes with *Piper*.

[2] Respondents suggest (Opp. 11, n. 2) that *Piper* requires flexibility only with respect to application of the *Gilbert* factors. However, *Piper* describes flexibility as an attribute of the *forum non conveniens* doctrine as a whole, not of the *Gilbert* factors alone. ("The Court of Appeals' decision is inconsistent with this Court's earlier *forum non conveniens* decisions in another respect. Those decisions have repeatedly emphasized the need to retain flexibility." 454 U.S. at 249.) Respondents submit there is no ambiguity on this point or other aspects of the adequate alternative forum test, but, if there were, the appropriate course would be for this Court to clarify the matter. This Court has had no occasion to provide guidance on the application of the *forum non conveniens* doctrine in the more than twenty years since *Piper*.

forum was not available a matter of law and without regard to other facts of the case.

2. The approach of the court below in disqualifying the espousal procedure eliminates any role for the exercise of the trial court's discretion. In this respect also the decision below is in conflict with *Piper* which makes it clear that "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court," and that the court of appeals may not "substitute[] its own judgment for that of the District Court." 454 U.S. at 257. Here, for example, there was evidence that Eritrea would follow the ordinary practice (*Restatement (Third) of the Foreign Relations Law of the United States* § 902, Cmt. i (1987)) and pay over to the private claimants the proceeds of any awards or settlements. This was supported not only by Eritrea's statements to the Commission (App. 7a) but by the terms in which Eritrea asserted the claims to the Commission, i.e., Eritrea seeks the awards "on behalf of" the individual claimants (App. 76a). There was no reason to doubt that Eritrea would follow the ordinary practice. Under *Piper*, the trial court was entitled in the exercise of its discretion to conclude that the risk that the process would miscarry was no greater than that in other forums that have been held to be adequate. Similar issues are routinely recognized as being within the trial court's discretion. *E.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2nd Cir. 2002) (the appellate court accepted the trial court's rejection of the charges of Ecuadorian courts' alleged corruption and favoritism; "[w]e cannot say these findings were an abuse of discretion"); *Iragorri v. International Elevator, Inc.*, 203 F.3d 8, 13-14 (1st Cir. 2000) (appellate court accepted the trial court's evaluation that potential personal danger to plaintiff did not make Columbia an inadequate forum; "the district court did not commit an abuse of discretion in assigning diminished weight to the State Department's advisory" against unnecessary travel to Columbia).

It is no answer for Respondents to point out (Opp. 9-10) that the court of appeals in its decision refers to some of the relevant factors. It was the responsibility of the trial court, not the court of appeals, to weigh these factors in the exercise of its discretion. In any event, the court of appeals did not base its decision on any such weighing but solely upon the fact that Eritrea had legal control of the claims. App. 7a, 8a-9a.

3. Respondents err in arguing (Opp. 11-15) that there is no conflict between the decision below and the decisions of other circuits. In an effort to avoid this conflict, Respondents argue that in *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987), the Second Circuit did not expressly rule on the question whether the Indian government's control of the claims of the private parties rendered the Indian forum inadequate. However, the court was well aware of the control of the claims by the government of India, and after a full review (809 F.2d at 198-199) of the district court's exhaustive analysis of the adequacy of the alternative forum (*In re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984,* 634 F.Supp. 842, 845-852 (S.D.N.Y. 1986)), held that the *forum non conveniens* dismissal was clearly warranted – that indeed "it might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal." 809 F.2d at 202. In contrast, the D.C. Circuit disqualified the Claims Commission for a factor – plaintiffs' lack of control of the claims – that was accepted without objection by the Second Circuit.

The Fifth Circuit decision in *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002), is also in conflict with the decision below. In *Gonzalez*, the Fifth Circuit accepted the foreign forum as adequate under *Piper* even though the law applicable there, as the court recognized, would result in

plaintiff having no chance of recovery. 301 F.3d at 382-383. In contrast, the D.C. Circuit here rejected the Eritrea Ethiopia Claims Commission as inadequate because the Respondents' recovery might theoretically be frustrated by Eritrea. A ruling by one court of appeals that a forum cannot be adequate because recovery could be frustrated under some circumstances cannot be reconciled with the decision of another circuit finding that the alternative forum is adequate notwithstanding the fact that it is certain that plaintiff cannot recover there.

4. Contrary to Respondents' assertion (Opp. 16), the decision of the court of appeals does effect a *per se* disqualification of state-to-state arbitral tribunals based on state espousal of private claims. The court of appeals found that the Eritrea Ethiopia Claims Commission was an inadequate forum solely because of the legal character of the espousal procedure, i.e., the espousing state's legal power over the claim. App. 8a-9a. The effect of the decision is to disqualify any state-to-state tribunal where private claims are espoused by the state because the legal principles upon which the court of appeals relied apply to any such tribunal.[3] *See Restatement, supra,* §§ 713 and 902, and § 902, Cmt. i.

Similarly, Respondents err in arguing (Opp. 18-19) that the decision below is a narrow one that has no effect on other tribunals based on state espousal of private claims. Contrary

---

[3] It is irrelevant that, as Respondents point out (Opp. 16-17), the court of appeals decision does not apply to claims that the private claimant can pursue in its own right (such as claims in excess of $250,000 before the Iran-United States Claims Tribunal). The court of appeals decision, and the Petitioners' argument here, deal with tribunals that operate on state espousal. Espousal is still the principal means by which private claims are pursued against foreign governments. Pet. 13.

to Respondents' assertion (Opp. 18), the decision below did address "principles of state espousal generally." The basis upon which the court of appeals disqualified the Claims Commission is a basic legal principle of state espousal. Pet. 12-14.

The court of appeals did not, as Respondents argue (Opp. 18), render its decision "in the unique context of Article 5(8) of the Agreement" between Ethiopia and Eritrea (which provides that actions filed prior to the date of the Agreement may be, but are not required to be, brought before the Claims Commission). Indeed, the court of appeals did not even mention Article 5(8) except to note that it did not reach Respondents' argument based upon that provision.[4] App. 6a. The court's rationale for disqualifying the tribunal depends solely upon the legal rights of the state that espouses the private claims. This rationale is entirely independent of whether the tribunal's governing instrument purports to permit or bar claims in other forums.

5. Respondents err in arguing (Opp. 19-21) that the court of appeals decision can have no impact upon the application of *forum non conveniens* if the instrument establishing the arbitral tribunal does not permit claims to be brought in other forums. Of course, Respondents' argument is not applicable if the pertinent agreement is silent on the issue of concurrent jurisdiction, i.e., if it defines the jurisdiction of the tribunal but does not purport to bar claims within its jurisdiction from being prosecuted in other forums. But even where the agreement does contain such a

---

[4] Respondents' argument (Opp. 18) that the absence of any discussion of Article 5(8) in the Petition betrays some "flaw" in Petitioners' argument is nonsensical. Article 5(8) was not discussed either in the court of appeals ruling or in the Petition because it is irrelevant both to the decision and to the reasons why that decision should be reviewed on certiorari.

prohibition, it is by no means clear that a U.S. court would give it effect to deprive the court of the power to adjudicate a dispute which by hypothesis is otherwise within its jurisdiction. In such a situation, the party bringing the lawsuit (i.e., the private claimant) would not be a party to the agreement containing the restriction. Moreover, the tribunal whose exclusive jurisdiction the U.S. court would be thus enforcing is a tribunal that falls in the category that the court of appeals here held to be "so clearly inadequate or unsatisfactory that it is no remedy at all." App. 8a.

6. There is no valid basis for Respondents' argument (Opp. 3, 21-22) that the decision below advances U.S. interests because it promotes the policy that Respondents allege to underlie Article 5(8) of the Agreement. Article 5(8) does not in fact have the purpose alleged by Respondents. *See* Supp. App. 3a-4a. But the court of appeals did not reach this issue. App. 6a. Its decision was based solely upon the legal consequences of espousal, and Respondents' theory of the purpose of Article 5(8) is irrelevant here.

7. Respondents err in arguing (Opp. 22) that the court of appeals decision poses no conflict with *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *Abrahim-Youri v. United States*, *supra*. As Petitioners have shown (Pet. 21-23), U.S. nationals can be lawfully required to submit their claims to a state-to-state arbitral tribunal (*Dames & Moore*) and to accept the settlement of the claims so submitted through state espousal (*Abrahim-Youri*). The holding of the decision below that a tribunal is inadequate because it employs the espousal procedure cannot be reconciled with the holding of *Abrahim-Youri* that U.S. nationals can be required to submit their claims to espousal.

Respondents sole attempt to distinguish *Abrahim-Youri* (Opp. 22) is to assert that it does not deal with the "same subject matter." But the subject matter is manifestly the same, i.e., the mandatory submission of private claims to

resolution through state espousal. The fact that the decision below arose in the context of *forum non conveniens* does not remove the patent inconsistency. There is nothing in the *forum non conveniens* doctrine that makes the espousal procedure less appropriate than in other contexts. Not only is the decision below in conflict with *Abrahim-Youri,* it is likewise in conflict with the practice – frequently adopted by the U.S. executive and recognized by the U.S. courts – of requiring private claims against foreign governments to be resolved through espousal. Pet. 23-25.

8. Finally, Respondents fail to rebut Petitioners' argument (Pet. 27-29) that the decision below undermines the role of the doctrine of *forum non conveniens* in permitting U.S. courts to screen out foreign disputes that fall within the letter of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, but are more appropriate for litigation in foreign forums than in U.S. courts. This Court and lower courts have expressly recognized this role for the doctrine of *forum non conveniens.* Pet. 27. Respondents' dictum (Opp. 23) that "[t]he only U.S. policy about hearing claims under the FSIA is reflected in the provisions of the FSIA itself" is contradicted by these decisions. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490, n. 15 (1983); *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 394 (2d Cir. 1985); *see also Piper*, 454 U.S. at 251, n. 17. Respondents' attempt to refute this is to point out that in this case the court below has not reached the question of FSIA jurisdiction. Opp. 23. But this has no bearing whatsoever upon the issue because the court of appeals decision by its rationale rules out *forum non conveniens* referral whether FSIA jurisdiction has been established or has yet to be decided.

CONCLUSION

The decision of the court of appeals does effect a *per se* disqualification of state-to-state arbitral tribunals based on state espousal of private claims, and in this it is in conflict with the decisions of this Court and lower courts and with the established practice of the U.S. government. For the reasons stated herein and in the Petition, the Court should grant certiorari and reverse the decision below.

Respectfully Submitted,

W. DeVier Pierson
Counsel of Record
Knox Bemis
Erica L. Salmon
Piper Rudnick, LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 371-6000

September 4, 2003

SUPPLEMENTAL APPENDIX

[Excerpts from the Declaration of B. Donovan Picard, dated 28 June 2001. The entire declaration appears at C.A. Joint App. A535-45.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HIWOT NEMARIAM, et al.,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA	:	Civil Action No. 00-CV-01392-TPJ
	:	
and	:	
	:	
THE COMMERCIAL BANK OF ETHIOPIA,	:	
	:	
Defendants.	:	

Declaration of B. Donovan Picard

1. My name is B. Donovan Picard. I am a citizen of the United States and an attorney admitted to practice before the courts of the District of Columbia and the State of Virginia, and before the United States Supreme Court.

2. I make this declaration in support of the Defendants' Motion to Dismiss and in opposition to

Plaintiffs' Memorandum of Law in Further Opposition to Defendants' Motion to Dismiss, both of which were filed in the captioned proceeding (the "Hiwot Nemariam litigation"). I provide in this declaration facts within my personal knowledge regarding the Claims Commission established under the December 12, 2000 Peace Agreement between Ethiopia and Eritrea (the "Peace Agreement").[1]

3. I graduated from the University of Virginia School of Law in 1976 with the degree of Juris Doctor. A substantial portion of my practice has been the representation of companies and governments in matters involving both public and private international law.

4. I was Legal Counsel to the Government of Ethiopia in the negotiations leading to the Peace Agreement, and I am at present Legal Counsel to the Government of Ethiopia in the proceedings before the Claims Commission and the Boundary Commission, both of which were established under the Peace Agreement. As Legal Counsel, I have been active in the representation of the Government of Ethiopia in the proceedings before the Claims Commission.

5. I have read the June 7, 2001 Declaration of Professor Lea Brilmayer and the June 7, 2001 Declaration of O. Thomas Johnson, Jr., both of which were appended to Plaintiffs' Memorandum of Law in Further Opposition to Defendants' Motion to Dismiss filed on June 8, 2001.

[Paragraphs 6-8, omitted here, appear at C.A. Joint App. A536-37.]

---

[1] The Peace Agreement is appended as Exhibit 6 to the April 25, 2001 Declaration of Ambassador Fisseha Yimer, which is Appendix A to Defendants' Reply in Support of Motion to Dismiss filed April 30, 2001.

Relation between the Claims Commission and claims filed in another forum.

9. During the negotiations that resulted in the Peace Agreement and the establishment of the Claims Commission, the parties were aware of claims that had been filed in other forums that would be within the proposed jurisdiction of the Claims Commission as defined in the Peace Agreement, including the claims filed in the Hiwot Nemariam litigation and claims filed by the Government of Ethiopia with the Court of Justice of the Common Market of Eastern States of Africa ("COMESA") for $130,000,000 in losses suffered by Ethiopia and its nationals due to the confiscation of property at the ports of Eritrea.

10. The Plaintiffs' June 8, 2001 Memorandum of Law in Further Opposition to Defendants' Motion to Dismiss (p. 18), and the June 7, 2001 Brilmayer Declaration (¶¶8-11) appended thereto are in error in stating that Ethiopia agreed that the establishment of the Claims Commission would "not interfere with" the Hiwot Nemariam litigation. What Ethiopia – and Eritrea – agreed to is set out in the Peace Agreement, Art. 5, ¶ 8, where it is stated that: "Except for claims ... filed in another forum prior to the effective date of this Agreement, the [Claims] Commission shall be the sole forum for adjudicating the claims described...." The effect of this provision is to give the Claims Commission concurrent but not exclusive jurisdiction of claims such as those in the Hiwot Nemariam litigation and in Ethiopia's COMESA action. There is nothing in the Peace Agreement, or in any other agreement between Ethiopia and Eritrea, that suggests that a court in the United States is a more appropriate forum for litigation of the Hiwot Nemariam claims. Nor is there any agreement that the Hiwot Nemariam litigation is to continue as if the Claims Commission did not exist, or any agreement that the Court in the Hiwot Nemariam litigation should not consider whether

the doctrine of *forum non conveniens* applies because the Claims Commission is the more appropriate forum.

11. On March 21, 2001, COMESA granted the motion filed by Ethiopia to stay the proceedings on the $130,000,000 in claims it had filed there so that the claims could be brought before the Claims Commission.

12. As noted above (¶ 8), the claims filed by Eritrea will include those subject to the Hiwot Nemariam litigation. Indeed, Professor Brilmayer's June 7, 2001 Declaration (at ¶¶ 21-23) confirms that Eritrea will include in its claims before the Commission the same claims the plaintiffs are pursuing in the Hiwot Nemariam litigation. For its part, Ethiopia has agreed that the Claims Commission is the appropriate forum for these claims and will itself bring corresponding claims to the Commission for the property losses and other injuries suffered by Ethiopians deported or displaced by the actions of Eritrea. See, May 1, 2001 submission of Ethiopia to the Claims Commission (Exhibit 2 to the Second Declaration of Ambassador Fisseha Yimer), at p. 13.

13. The Claims Commission will necessarily be the forum for consideration of all claims for personal injury and property loss that do not fall within the theory on which plaintiffs predicate their jurisdictional argument in Hiwot Nemariam. The only property that could be subject to adjudication in the Hiwot Nemariam litigation, even if plaintiffs' theory of jurisdiction were correct, is property that is "owned or operated" by the Commercial Bank of Ethiopia within the meaning of 28 U.S.C. § 1605(a)(3). All other property claims of the plaintiffs and all property claims of other deportees must necessarily be presented to the Claims Commission, as there is no jurisdictional basis for such claims to be considered by a United States court. For the same reason, all claims for personal injury of the plaintiffs in

the Hiwot Nemariam litigation and of all other deportees will be presented to the Claims Commission. It would be extremely disruptive of the proceedings of the Claims Commission to have those claims that are the subject of the Hiwot Nemariam litigation – i.e., some of the property claims of some of the deportees – considered separately in a court proceeding.

[Paragraphs 14-22, omitted here, appear at C.A. Joint App. A540-44.]

23. I swear under penalty of perjury that the foregoing statements are true to the best of my own personal knowledge.

/s/ B. Donovan Picard
B. Donovan Picard

Dated this 28th day
Of June, 2001